



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-139483-13]

RIN 1545-BL87

Treatment of Certain Transfers of Property to Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking; notice of proposed rulemaking by cross-reference to temporary regulation.

SUMMARY: This document contains proposed regulations relating to certain transfers of property by United States persons to foreign corporations. The proposed regulations affect United States persons that transfer certain property, including foreign goodwill and going concern value, to foreign corporations in nonrecognition transactions described in section 367 of the Internal Revenue Code (Code). The proposed regulations also combine portions of the existing regulations under section 367(a) into a single regulation. In addition, in the Rules and Regulations section of this issue of the **Federal Register**, temporary regulations are being issued under section 482 to clarify the coordination of the transfer pricing rules with other Code provisions. The text of those temporary regulations serves as the text of a portion of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-139483-13), Internal Revenue Service, Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-139483-13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224; or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-139483-13).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Ryan A. Bowen, (202) 317-6937; concerning submissions of comments or requests for a public hearing, Regina Johnson, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in the regulations have been submitted for review and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 (d)) under control number 1545-0026.

The collections of information are in §1.6038B-1(c)(4) and (d)(1). The collections of information are mandatory. The likely respondents are domestic corporations. Burdens associated with these requirements will be reflected in the burden for Form 926. Estimates for completing the Form 926 can be located in the form instructions.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

Books and records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

I. Current Law

A. Section 367(a)

Section 367(a)(1) provides that if, in connection with any exchange described in section 332, 351, 354, 356, or 361, a United States person (U.S. transferor) transfers property to a foreign corporation (outbound transfer), the transferee foreign corporation will not, for purposes of determining the extent to which gain shall be recognized on such transfer, be considered to be a corporation. As a result, under section 367(a)(1), the U.S. transferor recognizes any gain (but not loss) on the outbound transfer of the property. Section 367(a)(2) provides an exception to the application of section 367(a)(1) for certain transfers of stock or securities, and section 367(a)(3) provides an exception for transfers of certain property used in a trade or business.

Specifically, section 367(a)(3)(A) provides that, except as provided in regulations prescribed by the Secretary, the general rule of section 367(a)(1) will not apply to any property transferred to a foreign corporation for use by such foreign corporation in the active conduct of a trade or business outside of the United States (ATB exception). Section 367(a)(3)(B) provides that, except as provided in regulations prescribed by the

Secretary, certain property is not eligible for the ATB exception. The statute describes five categories of property that are not eligible for the ATB exception: (i) property described in paragraph (1) or (3) of section 1221(a) (relating to inventory and copyrights, etc.); (ii) installment obligations, accounts receivable, or similar property; (iii) foreign currency or other property denominated in foreign currency; (iv) intangible property within the meaning of section 936(h)(3)(B); and (v) property with respect to which the U.S. transferor is a lessor at the time of the transfer, unless the foreign corporation was the lessee.

Section 367(a)(3)(C) provides that, except as provided in regulations prescribed by the Secretary, the ATB exception will not apply to gain realized on an outbound transfer of the assets of a foreign branch to the extent that previously deducted losses of the branch exceed the taxable income earned by the branch after the losses were incurred (branch loss recapture rule). However, any realized gain in the property transferred that exceeds the branch losses that must be recaptured under this rule may qualify for the ATB exception.

Section 367(a)(6) provides that section 367(a)(1) will not apply to an outbound transfer of any property that the Secretary, in order to carry out the purposes of section 367(a), designates by regulation.

Sections 1.367(a)-2 and 1.367(a)-2T provide general rules for determining whether property is transferred for use by a transferee foreign corporation in the active conduct of a trade or business outside of the United States for purposes of the ATB exception.

Sections 1.367(a)-4 and 1.367(a)-4T provide special rules for determining whether certain property satisfies the ATB exception, including rules that apply to (i) property to be leased by the transferee foreign corporation, (ii) oil and gas working interests, (iii) compulsory transfers of property, and (iv) property to be sold by the foreign corporation. Section 1.367(a)-4T also provides special rules requiring the recapture of depreciation upon an outbound transfer of U.S. depreciated property and exempting outbound transfers of property to a FSC (within the meaning of section 922(a)) from the application of paragraphs (a) and (d) of section 367.

Sections 1.367(a)-5 and 1.367(a)-5T address the five categories of property ineligible for the ATB exception that are described in section 367(a)(3)(B) and provide narrow exceptions to certain of those categories. Section 1.367(a)-5T(d) (which addresses foreign currency and other property denominated in a foreign currency) allows certain property denominated in the foreign currency of the country in which the foreign corporation is organized to qualify under the ATB exception if that property was acquired in the ordinary course of the business of the U.S. transferor that will be carried on by the foreign corporation. Section 1.367(a)-5T(e) (which addresses intangible property) contains a deadwood reference to the application of section 367(a)(1) to a transfer of intangible property pursuant to section 332. In this regard, see §1.367(e)-2(a)(2), providing that section 367(a) does not apply to a liquidation described in section 332 of a U.S. subsidiary into a foreign parent corporation. Section 1.367(a)-5T(e) also provides a cross reference to section 367(d) for transfers of intangible property described in section 351 or 361.

Sections 1.367(a)-6 and 1.367(a)-6T provide rules for applying the branch loss recapture rule of section 367(a)(3)(C).

B. Section 367(d)

Section 367(d) provides rules for certain outbound transfers of intangible property. Section 367(d)(1) provides that, except as provided in regulations, if a U.S. transferor transfers any intangible property, within the meaning of section 936(h)(3)(B), to a foreign corporation in an exchange described in section 351 or 361, section 367(d) (and not section 367(a)) applies to such transfer.

Section 936(h)(3)(B) defines intangible property broadly to mean any:

(i) patent, invention, formula, process, design, pattern, or know-how;

(ii) copyright, literary, musical, or artistic composition;

(iii) trademark, trade name, or brand name;

(iv) franchise, license, or contract;

(v) method, program, system, procedure, campaign, survey, study, forecast, estimate, customer list, or technical data; or

(vi) any similar item,

which has substantial value independent of the services of any individual (section 936(h)(3)(B) intangible property).

Section 367(d)(2)(A) provides that a U.S. transferor that transfers intangible property subject to section 367(d) is treated as having sold the property in exchange for payments that are contingent upon the productivity, use, or disposition of the property. Specifically, the U.S. transferor is treated as receiving amounts that reasonably reflect the amounts that would have been received annually in the form of such payments over

the useful life of such property (section 367(d)(2)(A)(ii)(I)), or in the case of a disposition of the intangible property following such transfer (whether direct or indirect), at the time of the disposition (section 367(d)(2)(A)(ii)(II)). The amounts taken into account under section 367(d)(2)(A)(ii) must be commensurate with the income attributable to the intangible. Section 367(d)(2)(A) (flush language).

Section 1.367(d)-1T(b) generally provides that section 367(d) and §1.367(d)-1T apply to the transfer of any intangible property, but not to the transfer of foreign goodwill or going concern value, as defined in §1.367(a)-1T(d)(5)(iii) (foreign goodwill exception). Section 1.367(a)-1T(d)(5)(i) generally defines “intangible property,” for purposes of section 367, as knowledge, rights, documents, and any other intangible item within the meaning of section 936(h)(3)(B) that constitutes property for purposes of section 332, 351, 354, 355, 356, or 361, as applicable. The regulation further provides that a working interest in oil and gas property will not be considered to be intangible property for purposes of section 367 and the regulations thereunder.

Section 1.367(a)-1T(d)(5)(iii) defines “foreign goodwill or going concern value” as the residual value of a business operation conducted outside of the United States after all other tangible and intangible assets have been identified and valued. Section 1.367(a)-1T(d)(5)(iii) also provides that, for purposes of section 367 and the regulations thereunder, the value of a right to use a corporate name in a foreign country is treated as foreign goodwill or going concern value.

In addition to providing the foreign goodwill exception, §1.367(d)-1T(b) also excepts from section 367(d) property that is described in §1.367(a)-5T(b)(2), which, in

general, consists of copyrights and other items described in section 1221(a)(3). Those items, however, are not eligible for the ATB exception by reason of §1.367(a)-5T.

For purposes of §1.367(d)-1T, the useful life of intangible property is limited to 20 years under §1.367(d)-1T(c)(3).

C. Legislative History of Section 367(d)

Congress amended section 367 in 1984 to create objective statutory rules because, among other reasons, the IRS was experiencing challenges administering the prior version of the statute. The prior version provided that certain outbound transfers of property qualified for tax-free treatment only if the U.S. transferor established that the outbound transfer was “not in pursuance of a plan having as one its principal purposes the avoidance of Federal income taxes.”

In amending section 367, Congress also noted that “specific and unique problems exist” with respect to outbound transfers of intangible property and enacted section 367(d) in substantially its present form to address these transfers. S. REP. NO. 169, 98th Cong., 2d Sess., at 360 (1984); H.R. REP. NO. 432, 98th Cong., 2d Sess., at 1315 (1984). Congress identified problems as arising when “transferor U.S. companies hope to reduce their U.S. taxable income by deducting substantial research and experimentation expenses associated with the development of the transferred intangible and, by transferring the intangible to a foreign corporation at the point of profitability, to ensure deferral of U.S. tax on the profits generated by the intangible.” Id.

The favorable treatment of foreign goodwill and going concern value available under existing law is premised on statements in the legislative history of section 367(d). “The committee contemplates that, ordinarily, no gain will be recognized on the transfer

of goodwill or going concern value for use in an active trade or business.” S. REP. NO. 169, 98th Cong., 2d Sess., at 364; H.R. REP. NO. 432, 98th Cong., 2d Sess., at 1319. The Senate Finance Committee and the House Committee on Ways and Means each noted, without explanation, that it “does not anticipate that the transfer of goodwill or going concern value developed by a foreign branch to a newly organized foreign corporation will result in abuse of the U.S. tax system.” S. REP. NO. 169, 98th Cong., 2d Sess., at 362; H.R. REP. NO. 432, 98th Cong., 2d Sess., at 1317. However, neither section 367 nor its legislative history defines goodwill or going concern value of a foreign branch or discusses how goodwill or going concern value is attributed to a foreign branch.

D. Taxpayer Interpretations Regarding Foreign Goodwill and Going Concern Value Under Section 367

In general, taxpayers interpret section 367 and the regulations under section 367(a) and (d) in one of two alternative ways when claiming favorable treatment for foreign goodwill and going concern value.

Under one interpretation, taxpayers take the position that goodwill and going concern value are not section 936(h)(3)(B) intangible property and therefore are not subject to section 367(d) because section 367(d) applies only to section 936(h)(3)(B) intangible property. Under this interpretation, taxpayers assert that the foreign goodwill exception has no application. Furthermore, these taxpayers assert that gain realized with respect to the outbound transfer of goodwill or going concern value is not recognized under the general rule of section 367(a)(1) because the goodwill or going

concern value is eligible for, and satisfies, the ATB exception under section 367(a)(3)(A).

Under a second interpretation, taxpayers take the position that, although goodwill and going concern value are section 936(h)(3)(B) intangible property, the foreign goodwill exception applies. These taxpayers also assert that section 367(a)(1) does not apply to foreign goodwill or going concern value, either because of section 367(d)(1)(A) (providing that, except as provided in regulations, section 367(d) and not section 367(a) applies to section 936(h)(3)(B) intangible property) or because of the ATB exception.

II. Reasons for Change

The Treasury Department and the IRS are aware that, in the context of outbound transfers, certain taxpayers attempt to avoid recognizing gain or income attributable to high-value intangible property by asserting that an inappropriately large share (in many cases, the majority) of the value of the property transferred is foreign goodwill or going concern value that is eligible for favorable treatment under section 367.

Specifically, the Treasury Department and the IRS are aware that some taxpayers value the property transferred in a manner contrary to section 482 in order to minimize the value of the property transferred that they identify as section 936(h)(3)(B) intangible property for which a deemed income inclusion is required under section 367(d) and to maximize the value of the property transferred that they identify as exempt from current tax. For example, some taxpayers (i) use valuation methods that value items of intangible property on an item-by-item basis, when valuing the items on an aggregate basis would achieve a more reliable result under the arm's length

standard of the section 482 regulations, or (ii) do not properly perform a full factual and functional analysis of the business in which the intangible property is employed.

The Treasury Department and the IRS also are aware that some taxpayers broadly interpret the meaning of foreign goodwill and going concern value for purposes of section 367. Specifically, although the existing regulations under section 367 define foreign goodwill or going concern value by reference to a business operation conducted outside of the United States, some taxpayers have asserted that they have transferred significant foreign goodwill or going concern value when a large share of that value was associated with a business operated primarily by employees in the United States, where the business simply earned income remotely from foreign customers. In addition, some taxpayers take the position that value created through customer-facing activities occurring within the United States is foreign goodwill or going concern value.

The Treasury Department and the IRS have concluded that the taxpayer positions and interpretations described in this section of the preamble raise significant policy concerns and are inconsistent with the expectation, expressed in legislative history, that the transfer of foreign goodwill or going concern value developed by a foreign branch to a foreign corporation was unlikely to result in abuse of the U.S. tax system. See S. REP. NO. 169, 98th Cong., 2d Sess., at 362; H.R. REP. NO. 432, 98th Cong., 2d Sess., at 1317. The Treasury Department and the IRS considered whether the favorable treatment for foreign goodwill and going concern value under current law could be preserved while protecting the U.S. tax base through regulations expressly prescribing parameters for the portion of the value of a business that qualifies for the favorable treatment. For example, regulations could require that, to be eligible for the

favorable treatment, the value must have been created by activities conducted outside of the United States through an actual foreign branch that had been in operation for a minimum number of years and be attributable to unrelated foreign customers. The Treasury Department and the IRS ultimately determined, however, that such an approach would be impractical to administer. In particular, while the temporary regulations under section 482 that are published in the Rules and Regulations section of this issue of the **Federal Register** clarify the proper application of section 482 in important respects, there will continue to be challenges in administering the transfer pricing rules whenever the transfer of different types of intangible property gives rise to significantly different tax consequences. Given the amounts at stake, as long as foreign goodwill and going concern value are afforded favorable treatment, taxpayers will continue to have strong incentives to take aggressive transfer pricing positions to inappropriately exploit the favorable treatment of foreign goodwill and going concern value, however defined, and thereby erode the U.S. tax base.

For the reasons discussed in this section of the preamble, the Treasury Department and the IRS have determined that allowing intangible property to be transferred outbound in a tax-free manner is inconsistent with the policies of section 367 and sound tax administration and therefore will amend the regulations under section 367 as described in the Explanation of Provisions section of this preamble.

III. Coordination with Section 482

The temporary regulations under section 482 published in the Rules and Regulations section of this issue of the **Federal Register** clarify the coordination of the application of the arm's length standard and the best method rule in the regulations

under section 482 in conjunction with other Code provisions, including section 367, in determining the proper tax treatment of controlled transactions. The text of the temporary regulations under section 482 also serves as the text of a portion of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and the corresponding proposed regulations.

Explanation of Provisions

I. Eliminating the Foreign Goodwill Exception and Limiting the Scope of the ATB Exception

A. In General

The proposed regulations eliminate the foreign goodwill exception under §1.367(d)-1T and limit the scope of property that is eligible for the ATB exception generally to certain tangible property and financial assets. Accordingly, under the proposed regulations, upon an outbound transfer of foreign goodwill or going concern value, a U.S. transferor will be subject to either current gain recognition under section 367(a)(1) or the tax treatment provided under section 367(d).

B. Modifications to §1.367(d)-1T

Proposed §1.367(d)-1(b) provides that section 367(d) and §1.367(d)-1 apply to an outbound transfer of intangible property, as defined in proposed §1.367(a)-1(d)(5). Proposed §1.367(d)-1(b) does not provide an exception for any intangible property. Rather, as described in part II. of the Explanation of Provisions section of this preamble, proposed §1.367(a)-1(d)(5) modifies the definition of intangible property that applies for purposes of section 367(a) and (d). The modified definition facilitates both the elimination of the foreign goodwill exception as well as the addition of a rule under

which U.S. transferors may apply section 367(d) with respect to certain outbound transfers of property that otherwise would be subject to section 367(a) under the U.S. transferor's interpretation of section 936(h)(3)(B). The proposed regulations make certain coordinating changes to §1.367(d)-1T to take into account the elimination of the foreign goodwill exception and the revised definition of intangible property. The proposed regulations also eliminate the definition of foreign goodwill and going concern value under existing §1.367(a)-1T(d)(5)(iii) because it is no longer needed.

In addition, the proposed regulations eliminate the existing rule under §1.367(d)-1T(c)(3) that limits the useful life of intangible property to 20 years. When the useful life of the intangible property transferred exceeds 20 years, the limitation might result in less than all of the income attributable to the property being taken into account by the U.S. transferor. Accordingly, proposed §1.367(d)-1(c)(3) provides that the useful life of intangible property is the entire period during which the exploitation of the intangible property is reasonably anticipated to occur, as of the time of transfer. For this purpose, exploitation includes use of the intangible property in research and development. Consistent with the guidance for cost sharing arrangements in §1.482-7(g)(2)(ii)(A), if the intangible property is reasonably anticipated to contribute to its own further development or to developing other intangibles, then the period includes the period, reasonably anticipated at the time of the transfer, of exploiting (including use in research and development) such further development. Consequently, depending on the facts, the cessation of exploitation activity after a specific period of time may or may not be reasonably anticipated. See, e.g., §1.482-7(g)(4)(viii), Examples 1 (cessation anticipated after 15 years) and 7 (cessation not anticipated at any determinable date).

C. Modifications Relating to the ATB Exception

The rules for determining whether property is eligible for the ATB exception and whether the property satisfies the ATB exception currently are found in numerous regulations, namely §§1.367(a)-2, 1.367(a)-2T, 1.367(a)-4, 1.367(a)-4T, 1.367(a)-5, and 1.367(a)-5T (collectively, the ATB regulations). To make the regulations more accessible, the proposed regulations combine the ATB regulations, other than the depreciation recapture rule, into a single regulation under proposed §1.367(a)-2. The proposed regulations retain a coordination rule pursuant to which a transfer of stock or securities in an exchange subject to §1.367(a)-3 is not subject to §1.367(a)-2. See §1.367(a)-2(a)(1). The proposed regulations make conforming changes to the depreciation recapture rule, which is moved from §1.367(a)-4T to §1.367(a)-4, and the branch loss recapture rule, which remains under §§1.367(a)-6 and 1.367(a)-6T. Although minor wording changes have been made to certain aspects of the ATB regulations as part of consolidating them into a single regulation, the proposed regulations are not intended to be interpreted as making substantive changes to the ATB regulations except as otherwise described in this section of the preamble.

Under existing regulations, all property is eligible for the ATB exception, unless the property is specifically excluded. Under this structure, taxpayers have an incentive to take the position that certain intangible property is not described in section 936(h)(3)(B) and therefore not subject to section 367(d) and is instead subject to section 367(a) but eligible for the ATB exception because the intangible property is not specifically excluded from the ATB exception. The Treasury Department and the IRS have concluded that providing an exclusive list of property eligible for the ATB exception

will reduce the incentives for taxpayers to undervalue intangible property subject to section 367(d).

Thus, the proposed regulations provide that only certain types of property (as described in the next paragraph) are eligible for the ATB exception. However, in order for eligible property to satisfy the ATB exception, that property must also be considered transferred for use in the active conduct of a trade or business outside of the United States. Specifically, proposed §1.367(a)-2(a)(2) provides the general rule that an outbound transfer of property satisfies the ATB exception if (i) the property constitutes eligible property, (ii) the property is transferred for use by the foreign corporation in the active conduct of a trade or business outside of the United States, and (iii) certain reporting requirements under section 6038B are satisfied.

Under proposed §1.367(a)-2(b), eligible property is tangible property, working interests in oil and gas property, and certain financial assets, unless the property is also described in one of four categories of ineligible property. Proposed §1.367(a)-2(c) lists four categories of property not eligible for the ATB exception, which, in general, are (i) inventory or similar property; (ii) installment obligations, accounts receivable, or similar property; (iii) foreign currency or certain other property denominated in foreign currency; and (iv) certain leased tangible property. These four categories of property not eligible for the ATB exception include four of the five categories described in existing regulations under §§1.367(a)-5 and 1.367-5T. The category for intangible property is not retained because it is not relevant: Intangible property transferred to a foreign corporation pursuant to section 351 or 361 is not eligible property under proposed §1.367(a)-2(b) without regard to the application of proposed §1.367(a)-2(c).

The proposed regulations also eliminate the exception in existing §1.367(a)-5T(d)(2) that allows certain property denominated in the foreign currency of the country in which the foreign corporation is organized to qualify under the ATB exception if that property was acquired in the ordinary course of the business of the U.S. transferor that will be carried on by the foreign corporation. The Treasury Department and the IRS have determined that removing the exception is consistent with the general policy of section 367(a)(3)(B)(iii) to require gain to be recognized on an outbound transfer of foreign currency denominated property. Removing the exception will preserve the character, source, and amount of gain attributable to section 988 transactions that otherwise could be lost or changed if such gain were not immediately recognized but instead were reflected only in the U.S. transferor's basis in the stock of the foreign corporation.

The general rules for determining whether eligible property is transferred for use in the active conduct of a trade or business outside of the United States are described in proposed §1.367(a)-2(d). Also, paragraphs (e) through (h) of proposed §1.367(a)-2 provide special rules for certain property to be leased after the transfer, a working interest in oil and gas property, property that is re-transferred by the transferee foreign corporation to another person, and certain compulsory transfers of property, respectively. The proposed regulations also combine existing §1.367(a)-2T(c) (relating to property that is re-transferred by the foreign corporation) and a portion of §1.367(a)-4T(d) (relating to property to be sold by the foreign corporation) into proposed §1.367(a)-2(g), because both of these existing provisions relate to subsequent transfers of property by the foreign corporation. See proposed §1.367(a)-2(g)(1) and (2),

respectively. Proposed §1.367(a)-2(g)(2) does not retain the portion of existing §1.367(a)-4T(d) that applies to certain transfers of stock or securities. The Treasury Department and the IRS have determined that §§1.367(a)-3 and 1.367(a)-8 (generally requiring U.S. transferors that own five-percent or more of the stock of the foreign corporation to enter into a gain recognition agreement to avoid recognizing gain under section 367(a)(1) upon the outbound transfer of stock or securities) adequately carry out the policy of section 367(a) with respect to the transfer of stock or securities.

The proposed regulations modify the scope of the term U.S. depreciated property for purposes of the depreciation recapture rule to include section 126 property (as defined in section 1255(a)(2)).

The proposed regulations eliminate the special rules for outbound transfers of property to a FSC, because the FSC provisions have been repealed. Tax Increase Prevention and Reconciliation Act of 2005, Pub L. No. 109-222, §513, 120 Stat. 366 (2006); FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519, §2, 114 Stat. 2423 (2000).

Finally, the proposed regulations make conforming changes to the reporting requirements under §1.6038B-1(c)(4) to take into account the proposed regulations under §1.367(a)-2. The proposed regulations retain a rule providing relief for certain failures to comply with the reporting requirements of section 6038B and the regulations thereunder for qualification under the ATB exception, but that rule is moved to proposed §1.367(a)-2(j).

II. Treatment of Certain Property as Subject to Section 367(d)

Taxpayers take different positions as to whether goodwill and going concern value are section 936(h)(3)(B) intangible property, as discussed in part I.D. of the Background section of this preamble. The proposed regulations do not address this issue. However, the proposed regulations under §1.367(a)-1(b)(5) provide that a U.S. transferor may apply section 367(d) to a transfer of property, other than certain property described below, that otherwise would be subject to section 367(a) under the U.S. transferor's interpretation of section 936(h)(3)(B). Under this rule, a U.S. transferor that takes the position that goodwill and going concern value are not section 936(h)(3)(B) intangible property may nonetheless apply section 367(d) to goodwill and going concern value. This rule furthers sound tax administration by reducing the consequences of uncertainty as to whether value is attributable to property subject to section 367(a) or property subject to section 367(d). The application of section 367(d) in lieu of section 367(a) is available only for property that is not eligible property, as defined in proposed §1.367(a)-2(b) but, for this purpose, determined without regard to §1.367(a)-2(c) (which describes four categories of property explicitly excluded from the ATB exception). A U.S. transferor must disclose whether it is applying section 367(a) or (d) to a transfer of such property. See proposed §§1.6038B-1(c)(4)(vii) and -1(d)(1)(iv).

To implement this new rule under proposed §1.367(a)-1(b)(5) and the removal of the foreign goodwill exception, the proposed regulations revise the definition of "intangible property" that applies for purposes of sections 367(a) and (d). As revised, the term means either property described in section 936(h)(3)(B) or property to which a U.S. transferor applies section 367(d) (in lieu of applying section 367(a)). However, for this purpose and consistent with existing regulations, intangible property does not

include property described in section 1221(a)(3) (generally relating to certain copyrights) or a working interest in oil and gas property.

The regulations under §1.367(a)-7 (concerning outbound transfers of property subject to section 367(a) in certain asset reorganizations) use the term “section 367(d) property” to describe property that is not subject to section 367(a) and is therefore not subject to §1.367(a)-7. The proposed regulations modify the definition of section 367(d) property in §1.367(a)-7(f)(11) (which currently defines section 367(d) property as property described in section 936(h)(3)(B)) by reference to the new definition of “intangible property” under the proposed regulations. When the Treasury Department and the IRS issue regulations to implement the guidance described in Notice 2012-39 (IRB 2012-31) (announcing regulations to be issued addressing outbound transfers of intangible property subject to section 367(d) in certain asset reorganizations), the definition of “section 367(d) property” provided in section 4.05(3) of the notice will be similarly modified.

III. Modifications to §1.367(a)-1T

Section 1.482-1T(f)(2)(i) of the temporary regulations published elsewhere in the Rules and Regulations section of this issue of the **Federal Register** clarify the coordination of the application of the arm’s length standard and the best method rule in the regulations under section 482 in conjunction with other Code provisions, including section 367, in determining the proper tax treatment of controlled transactions.

Proposed §1.367(a)-1(b)(3) provides that, in cases where an outbound transfer of property subject to section 367(a) constitutes a controlled transaction, as defined in §1.482-1(i)(8), the value of the property transferred is determined in accordance with

section 482 and the regulations thereunder. This rule replaces existing §1.367(a)-1T(b)(3), which includes three rules.

First, §1.367(a)-1T(b)(3)(i) provides that “the gain required to be recognized . . . shall in no event exceed the gain that would have been recognized on a taxable sale of those items of property if sold individually and without offsetting individual losses against individual gains” (emphasis added). The Treasury Department and the IRS are concerned that in controlled transactions, taxpayers might have interpreted the wording “if sold individually” as inconsistent with §1.482-1T(f)(2)(i)(B) (as clarified in temporary regulations published elsewhere in the Rules and Regulations section in this issue of the **Federal Register**), which provides that an aggregate analysis of transactions may provide the most reliable measure of an arm’s length result in certain circumstances.

Second, §1.367(a)-1T(b)(3)(ii) provides that no loss may be recognized by reason of section 367. That rule duplicates a loss disallowance rule in §1.367(a)-1T(b)(1), which provides that section 367(a)(1) denies nonrecognition only to transfers of items of property on which gain is realized and that losses do not affect the amount of the gain recognized because of section 367(a)(1).

Third, §1.367(a)-1T(b)(3)(iii) provides a rule to address a scenario in which ordinary income and capital gain could exceed the amount described in §1.367(a)-1T(b)(3)(i). Because these regulations replace §1.367(a)-1T(b)(3)(i), §1.367(a)-1T(b)(3)(iii) is no longer necessary.

IV. Proposed Effective/Applicability Dates

The proposed regulations are proposed to apply to transfers occurring on or after **INSERT DATE THIS DOCUMENT IS FILED FOR PUBLIC INSPECTION BY THE**

FEDERAL REGISTER] and to transfers occurring before **[INSERT DATE THIS DOCUMENT IS FILED FOR PUBLIC INSPECTION BY THE FEDERAL REGISTER]** resulting from entity classification elections made under §301.7701-3 that are filed on or after **[INSERT DATE THIS DOCUMENT IS FILED FOR PUBLIC INSPECTION BY THE FEDERAL REGISTER]**. However, the removal of the exception currently provided in §1.367(a)-5T(d)(2) will apply to transfers occurring on or after the date that the rules proposed in this section are adopted as final regulations in a Treasury decision published in the **Federal Register** and to transfers occurring before that date resulting from entity classification elections made under §301.7701-3 that are filed on or after that date. For proposed dates of applicability, see §1.367(a)-1(g)(5), -2(k), -4(b), -6(k), -7(j)(2), 1.367(d)-1(j), and 1.6038B-1(g)(7). No inference is intended as to the application of the provisions proposed to be amended by these proposed regulations under current law. The IRS may, where appropriate, challenge transactions under applicable provisions or judicial doctrines.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It has been determined that section 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. This certification is based on the fact that the proposed regulations under

section 367(a) and (d) simplify existing regulations, and the regulations under section 6038B make relatively minor changes to existing information reporting requirements. Moreover, these regulations primarily will affect large domestic corporations filing consolidated returns. In addition, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply to the regulations under section 482 that are proposed herein, and published as temporary regulations in the Rules and Regulations section of this issue of the **Federal Register**, because those regulations do not impose a collection of information requirement on small entities. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the "Addresses" heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. In particular, comments are requested on whether, with respect to the proposed elimination of the foreign goodwill exception and narrowing of the scope of the ATB exception, a limited exception should be provided for certain narrow cases where there is limited potential for abuse. One such case, for example, might be a financial services business that operates in true branch form and for which there is regulatory pressure or compulsion to incorporate the assets of the branch in a foreign corporation. Comments should discuss how the IRS would administer any such exception. With respect to the ATB exception, comments are requested as to whether the definition of "financial asset" under proposed

§1.367(a)-2(b)(3) should be expanded to include other items. With respect to the proposed elimination of the 20-year limitation on the useful life of intangible property under §1.367(d)-1T(c)(3), comments are requested on ways to simplify the administration of inclusions that section 367(d) requires for property with a very long useful life. All comments will be available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting information

The principal author of these proposed regulations is Ryan Bowen, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Sections 1.367(a)-1 through 1.367(a)-7 also issued under 26 U.S.C. 367(a). * * *

Section 1.367(d)-1 also issued under 26 U.S.C. 367(d). * * *

Section 1.482-1 also issued under 26 U.S.C. 482.

Section 1.6038B-1 also issued under 26 U.S.C. 6038B. * * *

Par. 2. Section 1.367(a)-0 is added to read as follows:

§1.367(a)-0 Table of Contents.

This section lists the paragraphs contained in §§1.367(a)-1 through 1.367(a)-8.

§1.367(a)-1 Transfers to foreign corporations subject to section 367(a): In general.

- (a) Scope.
- (b) General rules.
 - (1) Foreign corporation not considered a corporation for purposes of certain transfers.
 - (2) Cases in which foreign corporate status is not disregarded.
 - (3) Determination of value.
 - (b)(4)(i)(A) [Reserved].
 - (b)(4)(ii) [Reserved].
 - (5) Treatment of certain property as subject to section 367(d).
- (c) [Reserved].
- (d) Definitions.
 - (d)(1) through (d)(2) [Reserved].
 - (3) Transfer.
 - (d)(4) [Reserved].
 - (5) Intangible property.
 - (6) Operating intangibles.
- (e) Close of taxable year in certain section 368(a)(1)(F) reorganizations.
- (f) Exchanges under sections 354(a) and 361(a) in certain section 368(a)(1)(F) reorganizations.
 - (1) Rule
 - (2) Rule applies regardless of whether a continuance under applicable law.
- (g) Effective date of certain sections.
 - (1) In general.
 - (g)(2) through (3) [Reserved].
 - (4)
 - (5) Effective/applicability dates.

§1.367(a)-2 Exceptions for transfers of property for use in the active conduct of a trade or business.

- (a) Scope and general rule.
 - (1) Scope.
 - (2) General rule.
- (b) Eligible property.
- (c) Exception for certain property.
 - (1) Inventory.
 - (2) Installment obligations, etc.
 - (3) Foreign currency, etc.
 - (4) Certain leased tangible property.
- (d) Active conduct of a trade or business outside the United States.
 - (1) In general.
 - (2) Trade or business.
 - (3) Active conduct.

- (4) Outside of the United States.
- (5) Use in the trade or business.
- (6) Active leasing and licensing.
- (e) Special rules for certain property to be leased.
 - (1) Leasing business of the foreign corporation.
 - (2) De minimis leasing by the foreign corporation.
 - (3) Aircraft and vessels leased in foreign commerce.
- (f) Special rules for oil and gas working interests.
 - (1) In general.
 - (2) Active use of working interest.
 - (3) Start-up operations.
 - (4) Other applicable rules.
- (g) Property retransferred by the foreign corporation.
 - (1) General rule.
 - (2) Exception.
- (h) Compulsory transfers of property.
- (i) [Reserved].
- (j) Failure to comply with reporting requirements of section 6038B.
 - (1) Failure to comply.
 - (2) Relief for certain failures to comply that are not willful.
- (k) Effective/applicability dates.
 - (1) In general.
 - (2) Foreign currency exception.

§1.367(a)-3 Treatment of transfers of stock or securities to foreign corporations.

- (a) In general.
 - (1) Overview.
 - (2) Exceptions for certain exchanges of stock or securities.
 - (3) Cross-references.
- (b) Transfers of stock or securities of foreign corporations.
 - (1) General rule.
 - (2) Certain transfers subject to sections 367(a) and (b).
- (c) Transfers of stock or securities of domestic corporations.
 - (1) General rule.
 - (2) Ownership presumption.
 - (3) Active trade or business test.
 - (4) Special rules.
 - (5) Definitions.
 - (6) Reporting requirements of U.S. target company.
 - (7) Ownership statements.
 - (8) Certain transfers in connection with performance of services.
 - (9) Private letter ruling option.
 - (10) Examples.
 - (11) Effective date.
- (d) Indirect stock transfers in certain nonrecognition transfers.
 - (1) In general.

- (2) Special rules for indirect transfers.
- (3) Examples.
- (e) [Reserved].
- (f) Failure to file statements.
 - (1) Failure to file.
 - (2) Relief for certain failures to file that are not willful.
- (g) Effective/applicability dates.
 - (1) Rules of applicability.
 - (2) Election.
- (h) Former 10-year gain recognition agreements.
- (i) [Reserved].
- (j) Transition rules regarding certain transfers of domestic or foreign stock or securities after December 16, 1987, and prior to July 20, 1998.
 - (1) Scope.
 - (2) Transfers of domestic or foreign stock or securities: additional substantive rules.
- (k) [Reserved].

§1.367(a)-4 Special rule applicable to U.S. depreciated property.

- (a) Depreciated property used in the United States.
 - (1) In general.
 - (2) U.S. depreciated property.
 - (3) Property used within and without the United States.
- (b) Effective/applicability dates.

§1.367(a)-5 [Reserved].

§1.367(a)-6 Transfer of foreign branch with previously deducted losses.

- (a) through (b)(1) [Reserved].
- (2) No active conduct exception.
- (c)(1) [Reserved].
- (2) Gain limitation.
- (3) [Reserved].
- (c)(4) through (j) [Reserved].
- (k) Effective/applicability dates.

§1.367(a)-7 Outbound transfers of property described in section 361(a) or (b).

- (a) Scope and purpose.
- (b) General rule.
 - (1) Nonrecognition exchanges enumerated in section 367(a)(1).
 - (2) Nonrecognition exchanges not enumerated in section 367(a)(1).
- (c) Elective exception.
 - (1) Control.
 - (2) Gain recognition.
 - (3) Basis adjustments required for control group members.
 - (4) Agreement to amend or file a U.S. income tax return.
 - (5) Election and reporting requirements.

(d) Section 361 exchange followed by successive distributions to which section 355 applies.

(e) Other rules.

(1) Section 367(a) property with respect to which gain is recognized.

(2) Relief for certain failures to comply that are not willful.

(3) Anti-abuse rule.

(4) Certain income inclusions under §1.367(b)-4.

(5) Certain gain under §1.367(a)-6.

(f) Definitions.

(g) Examples.

(h) Applicable cross-references.

(i) [Reserved].

(j) Effective/applicability dates.

(1) In general.

(2) Section 367(d) property.

§1.367(a)-8 Gain recognition agreement requirements.

(a) Scope.

(b) Definitions and special rules.

(1) Definitions.

(2) Special rules.

(c) Gain recognition agreement.

(1) Terms of agreement.

(2) Content of gain recognition agreement.

(3) Description of transferred stock or securities and other information.

(4) Basis adjustments for gain recognized.

(5) Terms and conditions of a new gain recognition agreement.

(6) Cross-reference.

(d) Filing requirements.

(1) General rule.

(2) Special requirements.

(3) Common parent as agent for U.S. transferor.

(e) Signatory.

(1) General rule.

(2) Signature requirement.

(f) Extension of period of limitations on assessments of tax.

(1) General rule.

(2) New gain recognition agreement.

(g) Annual certification.

(h) Use of security.

(i) [Reserved].

(j) Triggering events.

(1) Disposition of transferred stock or securities.

(2) Disposition of substantially all of the assets of the transferred corporation.

(3) Disposition of certain partnership interests.

(4) Disposition of stock of the transferee foreign corporation.

- (5) Deconsolidation.
- (6) Consolidation.
- (7) Death of an individual; trust or estate ceases to exist.
- (8) Failure to comply.
- (9) Gain recognition agreement filed in connection with indirect stock transfers and certain triangular asset reorganizations.
- (10) Gain recognition agreement filed pursuant to paragraph (k)(14) of this section.
- (k) Triggering event exceptions.
 - (1) Transfers of stock of the transferee foreign corporation to a corporation or partnership.
 - (2) Complete liquidation of U.S. transferor under sections 332 and 337.
 - (3) Transfers of transferred stock or securities to a corporation or partnership.
 - (4) Transfers of substantially all of the assets of the transferred corporation.
 - (5) Recapitalizations and section 1036 exchanges.
 - (6) Certain asset reorganizations.
 - (7) Certain triangular reorganizations.
 - (8) Complete liquidation of transferred corporation.
 - (9) Death of U.S. transferor.
 - (10) Deconsolidation.
 - (11) Consolidation.
 - (12) Intercompany transactions.
 - (13) Deemed asset sales pursuant to section 338(g) elections.
 - (14) Other dispositions or events.
- (l) [Reserved].
- (m) Receipt of boot in nonrecognition transactions.
 - (1) Dispositions of transferred stock or securities.
 - (2) Dispositions of assets of transferred corporation.
- (n) Special rules for distributions with respect to stock.
 - (1) Certain dividend equivalent redemptions treated as dispositions.
 - (2) Gain recognized under section 301(c)(3).
- (o) Dispositions or other events that terminate or reduce the amount of gain subject to the gain recognition agreement.
 - (1) Taxable disposition of stock of the transferee foreign corporation.
 - (2) Gain recognized in connection with certain nonrecognition transactions.
 - (3) Gain recognized under section 301(c)(3).
 - (4) Dispositions of substantially all of the assets of a domestic transferred corporation.
 - (5) Certain distributions or transfers of transferred stock or securities to U.S. persons.
 - (6) Dispositions or other event following certain intercompany transactions.
 - (7) Expropriations under foreign law.
- (p) Relief for certain failures to file or failures to comply that are not willful.
 - (1) In general.
 - (2) Procedures for establishing that a failure to file or failure to comply was not willful.
 - (3) Examples.
- (q) Examples.
 - (1) Presumed facts and references.
 - (2) Examples.

(r) Effective/applicability date.

(1) General rule.

(2) Applicability to transfers occurring before March 13, 2009.

(3) Applicability to requests for relief submitted before November 19, 2014.

Par. 3. Section 1.367(a)-1 is amended by revising paragraphs (a), (b)(1) through (3), (b)(4)(i)(B), (b)(5), (c)(3)(ii), (d) introductory text, (d)(5), (d)(6), and (g)(1) and (5) to read as follows:

§1.367(a)-1 Transfers to foreign corporations subject to section 367(a): In general.

(a) Scope. Section 367(a)(1) provides the general rule concerning certain transfers of property by a United States person (referred to at times in this section as the “U.S. person” or “U.S. transferor”) to a foreign corporation. Paragraph (b) of this section provides general rules explaining the effect of section 367(a)(1). Paragraph (c) of this section describes transfers of property that are described in section 367(a)(1). Paragraph (d) of this section provides definitions that apply for purposes of sections 367(a) and (d) and the regulations thereunder. Paragraphs (e) and (f) of this section provide rules that apply to certain reorganizations described in section 368(a)(1)(F). Paragraph (g) of this section provides dates of applicability. For rules concerning the reporting requirements under section 6038B for certain transfers of property to a foreign corporation, see §1.6038B-1.

(b) General rules--(1) Foreign corporation not considered a corporation for purposes of certain transfers. If a U.S. person transfers property to a foreign corporation in connection with an exchange described in section 351, 354, 356, or 361, then, pursuant to section 367(a)(1), the foreign corporation will not be considered to be a corporation for purposes of determining the extent to which gain is recognized on the transfer. Section 367(a)(1) denies nonrecognition treatment only to transfers of items of

property on which gain is realized. Thus, the amount of gain recognized because of section 367(a)(1) is unaffected by the transfer of items of property on which loss is realized (but not recognized).

(2) Cases in which foreign corporate status is not disregarded. For circumstances in which section 367(a)(1) does not apply to a U.S. transferor's transfer of property to a foreign corporation, and thus the foreign corporation is considered to be a corporation, see §§1.367(a)-2, 1.367(a)-3, and 1.367(a)-7.

(3) Determination of value. In cases in which a U.S. transferor's transfer of property to a foreign corporation constitutes a controlled transaction as defined in §1.482-1(i)(8), the value of the property transferred is determined in accordance with section 482 and the regulations thereunder.

(4)(i)(A) [Reserved]. For further guidance, see §1.367(a)-1T(b)(4)(i)(A).

(B) Appropriate adjustments to earnings and profits, basis, and other affected items will be made according to otherwise applicable rules, taking into account the gain recognized under section 367(a)(1). For purposes of applying section 362, the foreign corporation's basis in the property received is increased by the amount of gain recognized by the U.S. transferor under section 367(a) and the regulations issued pursuant to that section. To the extent the regulations provide that the U.S. transferor recognizes gain with respect to a particular item of property, the foreign corporation increases its basis in that item of property by the amount of such gain recognized. For example, §§1.367(a)-2, 1.367(a)-3, and 1.367(a)-4, provide that gain is recognized with respect to particular items of property. To the extent the regulations do not provide that gain recognized by the U.S. transferor is with respect to a particular item of property,

such gain is treated as recognized with respect to items of property subject to section 367(a) in proportion to the U.S. transferor's gain realized in such property, after taking into account gain recognized with respect to particular items of property transferred under any other provision of section 367(a). For example, §1.367(a)-6 provides that branch losses must be recaptured by the recognition of gain realized on the transfer but does not associate the gain with particular items of property. See also §1.367(a)-1(c)(3) for rules concerning transfers by partnerships or of partnership interests.

* * * * *

(b)(4)(ii) [Reserved]. For further guidance, see §1.367(a)-1T(b)(4)(ii).

(5) Treatment of certain property as subject to section 367(d). A U.S. transferor may apply section 367(d) and §1.367(d)-1, rather than section 367(a) and the regulations thereunder, to a transfer of property to a foreign corporation that otherwise would be subject to section 367(a), provided that the property is not eligible property, as defined in §1.367(a)-2(b) but determined without regard to §1.367(a)-2(c). A U.S. transferor and any other U.S. transferor that is related (within the meaning of section 267(b) or 707(b)(1)) to the U.S. transferor must consistently apply this paragraph (b)(5) to all property described in this paragraph (b)(5) that is transferred to one or more foreign corporations pursuant to a plan. A U.S. transferor applies the provisions of this paragraph (b)(5) in the form and manner set forth in §1.6038B-1(d)(1)(iv) and (v).

(c)(1) through (3)(i) [Reserved]. For further guidance, see §1.367(a)-1T(c)(1) through (3)(i).

(c)(3)(ii) Transfer of partnership interest treated as transfer of proportionate share of assets--(A) In general. If a U.S. person transfers an interest as a partner in a

partnership (whether foreign or domestic) in an exchange described in section 367(a)(1), then that person is treated as having transferred a proportionate share of the property of the partnership in an exchange described in section 367(a)(1). Accordingly, the applicability of the exception to section 367(a)(1) provided in §1.367(a)-2 is determined with reference to the property of the partnership rather than the partnership interest itself. A U.S. person's proportionate share of partnership property is determined under the rules and principles of sections 701 through 761 and the regulations thereunder.

(c)(3)(ii)(B) through (7) [Reserved]. For further guidance, see §1.367(a)-1T(c)(3)(ii)(B) through (7).

* * * * *

(d) Definitions. The following definitions apply for purposes of sections 367(a) and (d) and the regulations thereunder.

(1) and (2) [Reserved]. For further guidance, see §1.367(a)-1T(d)(1) and (2).

* * * * *

(4) [Reserved]. For further guidance, see §1.367(a)-1T(d)(4).

(5) Intangible property. The term “intangible property” means either property described in section 936(h)(3)(B) or property to which a U.S. person applies section 367(d) pursuant to paragraph (b)(5) of this section, but does not include property described in section 1221(a)(3) or a working interest in oil and gas property.

(6) Operating intangibles. An operating intangible is any property described in section 936(h)(3)(B) of a type not ordinarily licensed or otherwise transferred in transactions between unrelated parties for consideration contingent upon the licensee's

or transferee's use of the property. Examples of operating intangibles may include long-term purchase or supply contracts, surveys, studies, and customer lists.

* * * * *

(g) Effective date of certain sections--(1) In general. Except as specifically provided to the contrary elsewhere in these sections, §§1.367(a)-1T and 1.367(a)-6T apply to transfers occurring after December 31, 1984.

(2) and (3) [Reserved]. For further guidance, see §1.367(a)-1T(g)(2) and (3).

* * * * *

(5) Effective/applicability dates. Paragraphs (a), (b)(1), (b)(2), (b)(3), (b)(5), (d) introductory text, (d)(5), and (d)(6) of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§1.367(a)-1 and 1.367(a)-1T as contained in 26 CFR part 1 revised as of April 1, 2015.

Par. 4. Section 1.367(a)-2 is amended by:

1. Revising paragraphs (a) through (d).
2. Redesignating paragraph (e)(1) as paragraph (d)(6) and revising, and removing paragraph (e)(2).
3. Redesignating paragraph (f) as paragraph (j), and revising newly redesignated paragraphs (j)(1), (j)(2)(i), the first sentence of paragraph (j)(2)(ii)(B), and (j)(3) and (4).
4. Adding paragraphs (e) through (i) and (k).

The revisions and additions read as follows:

§1.367(a)-2 Exceptions for transfers of property for use in the active conduct of a trade or business.

(a) Scope and general rule--(1) Scope. Paragraph (a)(2) of this section provides the general exception to section 367(a)(1) for certain property transferred for use in the active conduct of a trade or business. Paragraph (b) of this section describes property that is eligible for the exception provided in paragraph (a)(2) of this section. Paragraph (c) of this section describes property that is not eligible for the exception provided in paragraph (a)(2) of this section. Paragraph (d) of this section provides general rules, and paragraphs (e) through (h) of this section provide special rules, for determining whether property is used in the active conduct of a trade or business outside of the United States. Paragraph (i) of this section is reserved. Paragraph (j) of this section provides relief for certain failures to comply with the reporting requirements under paragraph (a)(2)(iii) of this section that are not willful. Paragraph (k) of this section provides dates of applicability. The rules of this section do not apply to a transfer of stock or securities in an exchange subject to §1.367(a)-3.

(2) General rule. Except as otherwise provided in §§1.367(a)-4, 1.367(a)-6, and 1.367(a)-7, section 367(a)(1) does not apply to property transferred by a United States person (U.S. transferor) to a foreign corporation if--

- (i) The property constitutes eligible property;
- (ii) The property is transferred for use by the foreign corporation in the active conduct of a trade or business outside of the United States, as determined under paragraph (d), (e), (f), (g), or (h) of this section, as applicable; and

(iii) The U.S. transferor complies with the reporting requirements of section 6038B and the regulations thereunder.

(b) Eligible property. Except as provided in paragraph (c) of this section, eligible property means--

(1) Tangible property;

(2) A working interest in oil and gas property; and

(3) A financial asset. For purposes of this section, a financial asset is--

(i) a cash equivalent;

(ii) a security within the meaning of section 475(c)(2), without regard to the last sentence of section 475(c)(2) (referencing section 1256) and without regard to section 475(c)(4), but excluding an interest in a partnership;

(iii) a commodities position described in section 475(e)(2)(B), 475(e)(2)(C), or 475(e)(2)(D); and

(iv) a notional principal contract described in §1.446-3(c)(1).

(c) Exception for certain property. Notwithstanding paragraph (b) of this section, property described in paragraph (c)(1), (2), (3), or (4) of this section does not constitute eligible property.

(1) Inventory. Stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business (including raw materials and supplies, partially completed goods, and finished products).

(2) Installment obligations, etc. Installment obligations, accounts receivable, or similar property, but only to the extent that the principal amount of any such obligation has not previously been included by the taxpayer in its taxable income.

(3) Foreign currency, etc.--(i) In general. Foreign currency or other property denominated in foreign currency, including installment obligations, futures contracts, forward contracts, accounts receivable, or any other obligation entitling its payee to receive payment in a currency other than U.S. dollars.

(ii) Limitation of gain required to be recognized. If section 367(a)(1) applies to a transfer of property described in paragraph (c)(3)(i) of this section, then the gain required to be recognized is limited to the gain realized as part of the same transaction upon the transfer of property described in paragraph (c)(3)(i) of this section, less any loss realized as part of the same transaction upon the transfer of property described in paragraph (c)(3)(i) of this section. This limitation applies in lieu of the rule in §1.367(a)-1(b)(1). No loss is recognized with respect to property described in this paragraph (c)(3).

(4) Certain leased tangible property. Tangible property with respect to which the transferor is a lessor at the time of the transfer, unless either the foreign corporation is the lessee at the time of the transfer or the foreign corporation will lease the property to third persons.

(d) Active conduct of a trade or business outside the United States--(1) In general. Except as provided in paragraphs (e), (f), (g), and (h) of this section, to determine whether property is transferred for use by the foreign corporation in the active

conduct of a trade or business outside of the United States, four factual determinations must be made:

(i) What is the trade or business of the foreign corporation (see paragraph (d)(2) of this section);

(ii) Do the activities of the foreign corporation constitute the active conduct of that trade or business (see paragraph (d)(3) of this section);

(iii) Is the trade or business conducted outside of the United States (see paragraph (d)(4) of this section); and

(iv) Is the transferred property used or held for use in the trade or business (see paragraph (d)(5) of this section)?

(2) Trade or business. Whether the activities of the foreign corporation constitute a trade or business is determined based on all the facts and circumstances. In general, a trade or business is a specific unified group of activities that constitute (or could constitute) an independent economic enterprise carried on for profit. For example, the activities of a foreign selling subsidiary could constitute a trade or business if they could be independently carried on for profit, even though the subsidiary acts exclusively on behalf of, and has operations fully integrated with, its parent corporation. To constitute a trade or business, a group of activities must ordinarily include every operation which forms a part of, or a step in, a process by which an enterprise may earn income or profit. In this regard, one or more of such activities may be carried on by independent contractors under the direct control of the foreign corporation. (However, see paragraph (d)(3) of this section.) The group of activities must ordinarily include the collection of income and the payment of expenses. If the activities of the foreign corporation do not

constitute a trade or business, then the exception provided by this section does not apply, regardless of the level of activities carried on by the corporation. The following activities are not considered to constitute by themselves a trade or business for purposes of this section:

(i) Any activity giving rise to expenses that would be deductible only under section 212 if the activities were carried on by an individual; or

(ii) The holding for one's own account of investments in stock, securities, land, or other property, including casual sales thereof.

(3) Active conduct. Whether a trade or business is actively conducted by the foreign corporation is determined based on all the facts and circumstances. In general, a corporation actively conducts a trade or business only if the officers and employees of the corporation carry out substantial managerial and operational activities. A corporation may be engaged in the active conduct of a trade or business even though incidental activities of the trade or business are carried out on behalf of the corporation by independent contractors. In determining whether the officers and employees of the corporation carry out substantial managerial and operational activities, however, the activities of independent contractors are disregarded. On the other hand, the officers and employees of the corporation are considered to include the officers and employees of related entities who are made available to and supervised on a day-to-day basis by, and whose salaries are paid by (or reimbursed to the lending related entity by), the foreign corporation. See paragraph (d)(6) of this section for the standard that applies to determine whether a trade or business that produces rents or royalties is actively conducted. The rule of this paragraph (d)(3) is illustrated by the following example.

Example. X, a domestic corporation, and Y, a foreign corporation not related to X, transfer property to Z, a newly formed foreign corporation organized for the purpose of combining the research activities of X and Y. Z contracts all of its operational and research activities to Y for an arm's-length fee. Z's activities do not constitute the active conduct of a trade or business.

(4) Outside of the United States. Whether the foreign corporation conducts a trade or business outside of the United States is determined based on all the facts and circumstances. Generally, the primary managerial and operational activities of the trade or business must be conducted outside the United States and immediately after the transfer the transferred assets must be located outside the United States. Thus, the exception provided by this section would not apply to the transfer of the assets of a domestic business to a foreign corporation if the domestic business continued to operate in the United States after the transfer. In such a case, the primary operational activities of the business would continue to be conducted in the United States. Moreover, the transferred assets would be located in the United States. However, it is not necessary that every item of property transferred be used outside of the United States. As long as the primary managerial and operational activities of the trade or business are conducted outside of the United States and substantially all of the transferred assets are located outside the United States, incidental items of transferred property located in the United States may be considered to have been transferred for use in the active conduct of a trade or business outside of the United States.

(5) Use in the trade or business. Whether property is used or held for use by the foreign corporation in a trade or business is determined based on all the facts and circumstances. In general, property is used or held for use in the foreign corporation's trade or business if it is--

(i) Held for the principal purpose of promoting the present conduct of the trade or business;

(ii) Acquired and held in the ordinary course of the trade or business; or

(iii) Otherwise held in a direct relationship to the trade or business. Property is considered held in a direct relationship to a trade or business if it is held to meet the present needs of that trade or business and not its anticipated future needs. Thus, property will not be considered to be held in a direct relationship to a trade or business if it is held for the purpose of providing for future diversification into a new trade or business, future expansion of trade or business activities, future plant replacement, or future business contingencies.

(6) Active leasing and licensing. For purposes of paragraph (d)(3) of this section, whether a trade or business that produces rents or royalties is actively conducted is determined under the principles of section 954(c)(2)(A) and the regulations thereunder, but without regard to whether the rents or royalties are received from an unrelated party. See §§1.954-2(c) and (d).

(e) Special rules for certain property to be leased--(1) Leasing business of the foreign corporation. Except as otherwise provided in this paragraph (e), tangible property that will be leased to another person by the foreign corporation will be considered to be transferred for use by the foreign corporation in an active trade or business outside the United States only if--

(i) The foreign corporation's leasing of the property constitutes the active conduct of a leasing business, as determined under paragraph (d)(6) of this section;

(ii) The lessee of the property is not expected to, and does not, use the property in the United States; and

(iii) The foreign corporation has a need for substantial investment in assets of the type transferred.

(2) De minimis leasing by the foreign corporation. Tangible property that will be leased to another person by the foreign corporation but that does not satisfy the conditions of paragraph (e)(1) of this section will, nevertheless, be considered to be transferred for use in the active conduct of a trade or business if either--

(i) The property transferred will be used by the foreign corporation in the active conduct of a trade or business but will be leased during occasional brief periods when the property would otherwise be idle, such as an airplane leased during periods of excess capacity; or

(ii) The property transferred is real property located outside the United States and--

(A) The property will be used primarily in the active conduct of a trade or business of the foreign corporation; and

(B) Not more than ten percent of the square footage of the property will be leased to others.

(3) Aircraft and vessels leased in foreign commerce. For purposes of satisfying paragraph (e)(1) of this section, an aircraft or vessel, including component parts such as an engine leased separately from the aircraft or vessel, that will be leased to another person by the foreign corporation will be considered to be transferred for use in the active conduct of a trade or business if--

(i) The employees of the foreign corporation perform substantial managerial and operational activities of leasing aircraft or vessels outside the United States; and

(ii) The leased property is predominantly used outside the United States, as determined under §1.954-2(c)(2)(v).

(f) Special rules for oil and gas working interests--(1) In general. A working interest in oil and gas property will be considered to be transferred for use in the active conduct of a trade or business if--

(i) The transfer satisfies the conditions of paragraph (f)(2) or (f)(3) of this section;

(ii) At the time of the transfer, the foreign corporation has no intention to farm out or otherwise transfer any part of the transferred working interest; and

(iii) During the first three years after the transfer there are no farmouts or other transfers of any part of the transferred working interest as a result of which the foreign corporation retains less than a 50-percent share of the transferred working interest.

(2) Active use of working interest. A working interest in oil and gas property that satisfies the conditions in paragraphs (f)(1)(ii) and (iii) of this section will be considered to be transferred for use in the active conduct of a trade or business if--

(i) The U.S. transferor is regularly and substantially engaged in exploration for and extraction of minerals, either directly or through working interests in joint ventures, other than by reason of the property that is transferred;

(ii) The terms of the working interest transferred were actively negotiated among the joint venturers;

(iii) The working interest transferred constitutes at least a five percent working interest;

(iv) Before and at the time of the transfer, through its own employees or officers, the U.S. transferor was regularly and actively engaged in--

(A) Operating the working interest, or

(B) Analyzing technical data relating to the activities of the venture;

(v) Before and at the time of the transfer, through its own employees or officers, the U.S. transferor was regularly and actively involved in decision making with respect to the operations of the venture, including decisions relating to exploration, development, production, and marketing; and

(vi) After the transfer, the foreign corporation will for the foreseeable future satisfy the requirements of subparagraphs (iv) and (v) of this paragraph (f)(2).

(3) Start-up operations. A working interest in oil and gas property that satisfies the conditions in paragraphs (f)(1)(ii) and (iii) of this section but that does not satisfy all the requirements of paragraph (f)(2) of this section will, nevertheless, be considered to be transferred for use in the active conduct of a trade or business if--

(i) The working interest was acquired by the U.S. transferor immediately before the transfer and for the specific purpose of transferring it to the foreign corporation;

(ii) The requirements of paragraphs (f)(2)(ii) and (iii) of this section are satisfied; and

(iii) The foreign corporation will for the foreseeable future satisfy the requirements of paragraph (f)(2)(iv) and (v) of this section.

(4) Other applicable rules. A working interest in oil and gas property that is not described in paragraph (f)(1) of this section may nonetheless qualify for the exception to section 367(a)(1) contained in this section depending upon the facts and circumstances.

(g) Property retransferred by the foreign corporation--(1) General rule. Property will not be considered to be transferred for use in the active conduct of a trade or business outside of the United States if--

(i) At the time of the transfer, it is reasonable to believe that, in the reasonably foreseeable future, the foreign corporation will sell or otherwise dispose of any material portion of the property other than in the ordinary course of business; or

(ii) Except as provided in paragraph (g)(2) of this section, the foreign corporation receives the property in an exchange described in section 367(a)(1), and, as part of the same transaction, transfers the property to another person. For purposes of the preceding sentence, a subsequent transfer within six months of the initial transfer will be considered to be part of the same transaction, and a subsequent transfer more than six months after the initial transfer may be considered to be part of the same transaction under step-transaction principles.

(2) Exception. Notwithstanding paragraph (g)(1)(ii) of this section, property will be considered to be transferred for use in the active conduct of a trade or business outside of the United States if--

(i) The initial transfer to the foreign corporation is followed by one or more subsequent transfers described in section 351 or 721; and

(ii) Each subsequent transferee is either a partnership in which the preceding transferor is a general partner or a corporation in which the preceding transferor owns common stock; and

(iii) The ultimate transferee is considered to use the property in the active conduct of a trade or business outside of the United States, as determined by applying

paragraph (d), (e), or (f) of this section, as applicable, with respect to the ultimate transferee rather than the foreign corporation.

(h) Compulsory transfers of property. Property is presumed to be transferred for use in the active conduct of a trade or business outside of the United States, if--

(1) The property was previously in use in the country in which the foreign corporation is organized; and

(2) The transfer is either:

(i) Legally required by the foreign government as a necessary condition of doing business; or

(ii) Compelled by a genuine threat of immediate expropriation by the foreign government.

(i) [Reserved].

(j) Failure to comply with reporting requirements of section 6038B--(1) Failure to comply. For purposes of the exception to the application of section 367(a)(1) provided in paragraph (a)(2) of this section, a failure to comply with the reporting requirements of section 6038B and the regulations thereunder (failure to comply) has the meaning set forth in §1.6038B-1(f)(2).

(2) Relief for certain failures to comply that are not willful--(i) In general. A failure to comply described in paragraph (j)(1) of this section will be deemed not to have occurred for purposes of satisfying the requirements of this section if the taxpayer demonstrates that the failure was not willful using the procedure set forth in this paragraph (j)(2). For this purpose, willful is to be interpreted consistent with the meaning of that term in the context of other civil penalties, which would include a failure

due to gross negligence, reckless disregard, or willful neglect. Whether a failure to comply was a willful failure will be determined by the Director of Field Operations International, Large Business & International (or any successor to the roles and responsibilities of such position, as appropriate) (Director) based on all the facts and circumstances. The taxpayer must submit a request for relief and an explanation as provided in paragraph (j)(2)(ii)(A) of this section. Although a taxpayer whose failure to comply is determined not to be willful will not be subject to gain recognition under this section, the taxpayer will be subject to a penalty under section 6038B if the taxpayer fails to demonstrate that the failure was due to reasonable cause and not willful neglect. See §1.6038B-1(b)(1) and (f). The determination of whether the failure to comply was willful under this section has no effect on any request for relief made under §1.6038B-1(f).

(ii) * * *

(B) Notice requirement. In addition to the requirements of paragraph (j)(2)(ii)(A) of this section, the taxpayer must comply with the notice requirements of this paragraph (j)(2)(ii)(B). * * *

(3) For illustrations of the application of the willfulness standard of this paragraph (j), see the examples in §1.367(a)-8(p)(3).

(4) Paragraph (j) applies to requests for relief submitted on or after November 19, 2014.

(k) Effective/applicability dates--(1) In general. Except as provided in paragraph (k)(2) of this section, the rules of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting

from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§1.367(a)-2, -2T, -4, -4T, -5, and -5T as contained in 26 CFR part 1 revised as of April 1, 2015.

(2) Foreign currency exception. Notwithstanding paragraph (c)(3)(i) of this section, §1.367(a)-5T(d)(2) as contained in 26 CFR part 1 revised as of April 1, 2015, applies to transfers of property denominated in a foreign currency occurring before the date that the rules proposed in this section are adopted as final regulations in a Treasury decision published in the **Federal Register**, other than transfers occurring before that date resulting from entity classification elections made under §301.7701-3 that are filed on or after that date.

§1.367(a)-3 [Amended]

Par. 5. For each section listed in following the table, remove the language in the “Remove” column and add in its place the language in the “Add” column.

<u>Section</u>	<u>Remove</u>	<u>Add</u>
§1.367(a)-3(a)(3), first sentence	§1.367(a)-1T(c)	§1.367(a)-1(c)
§1.367(a)-3(c)(4)(i), last sentence	§1.367(a)-1T(c)(3)	§1.367(a)-1(c)(3)
§1.367(a)-3(c)(4)(iv), first sentence	§1.367(a)-1T(d)(1)	§1.367(a)-1(d)(1)
§1.367(a)-3(c)(3)(i)(A)	§1.367(a)-2T(b)(2) and (3)	§1.367(a)-2(d)(2), (3), and (4)
§1.367(a)-3(c)(3)(ii)(B), last sentence	§1.367(a)-2T(b)(2) and (3)	§1.367(a)-2(d)(2) and (3)
§1.367(a)-3(d)(3) Example 7A(ii), penultimate sentence	§1.367(a)-2T(a)(2)	§1.367(a)-2(a)(2)(iii)
§1.367(a)-3(d)(3) Example 13(i), penultimate sentence	§1.367(a)-2T(c)(2)	§1.367(a)-2(g)(2)

Par. 6. Section 1.367(a)-4 is revised to read as follows:

§1.367(a)-4 Special rule applicable to U.S. depreciated property.

(a) Depreciated property used in the United States--(1) In general. A U.S. person that transfers U.S. depreciated property (as defined in paragraph (a)(2) of this section) to a foreign corporation in an exchange described in section 367(a)(1), must include in its gross income for the taxable year in which the transfer occurs ordinary income equal to the gain realized that would have been includible in the transferor's gross income as ordinary income under section 617(d)(1), 1245(a), 1250(a), 1252(a), 1254(a), or 1255(a), whichever is applicable, if at the time of the transfer the U.S. person had sold the property at its fair market value. Recapture of depreciation under this paragraph (a) is required regardless of whether the exception to section 367(a)(1) provided by §1.367(a)-2(a)(2) applies to the transfer of the U.S. depreciated property. However, the transfer of the U.S. depreciated property may qualify for the exception with respect to realized gain that is not included in ordinary income pursuant to this paragraph (a).

(2) U.S. depreciated property. U.S. depreciated property subject to the rules of this paragraph (a) is any property that--

(i) Is either mining property (as defined in section 617(f)(2)), section 1245 property (as defined in section 1245(a)(3)), section 1250 property (as defined in section 1250(c)), farm land (as defined in section 1252(a)(2)), section 1254 property (as defined in section 1254(a)(3)), or section 126 property (as defined in section 1255(a)(2)); and

(ii) Has been used in the United States or has been described in section 168(g)(4) before its transfer.

(3) Property used within and without the United States. (i) If U.S. depreciated property has been used partly within and partly without the United States, then the

amount required to be included in ordinary income pursuant to this paragraph (a) is reduced to an amount determined in accordance with the following formula:

$$\text{Full recapture amount} \quad \times \quad \frac{\text{U.S. use}}{\text{Total use}}$$

(ii) For purposes of the fraction in paragraph (a)(3)(i) of this section, the "full recapture amount" is the amount that would otherwise be included in the transferor's income under paragraph (a)(1) of this section. "U.S. use" is the number of months that the property either was used within the United States or qualified as section 38 property by virtue of section 48(a)(2)(B), and was subject to depreciation by the transferor or a related person. "Total use" is the total number of months that the property was used (or available for use), and subject to depreciation, by the transferor or a related person. For purposes of this paragraph (a)(3), property is not considered to have been in use outside of the United States during any period in which such property was, for purposes of section 48 or 168, treated as property not used predominantly outside the United States pursuant to the provisions of section 48(a)(2)(B). For purposes of this paragraph (b)(3) the term "related person" has the meaning set forth in §1.367(d)-1(h).

(b) Effective/applicability dates. The rules of this section apply to transfers occurring on or after September 14, 2015,] and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§1.367(a)-4 and 1.367(a)-4T as contained in 26 CFR part 1 revised as of April 1, 2015.

§ 1.367(a)-5 [Removed and Reserved]

Par. 7. Section 1.367(a)-5 is removed and reserved.

Par. 8. Section 1.367(a)-6 is added to read as follows:

§1.367(a)-6 Transfer of foreign branch with previously deducted losses.

(a) through (b)(1) [Reserved]. For further guidance, see §1.367(a)-6T(a) through (b)(1).

(b)(2) No active conduct exception. The rules of this paragraph (b) apply regardless of whether any of the assets of the foreign branch satisfy the active trade or business exception of §1.367(a)-2(a)(2).

(c)(1) [Reserved]. For further guidance, see §1.367(a)-6T(c)(1).

(2) Gain limitation. The gain required to be recognized under paragraph (b)(1) of this section will not exceed the aggregate amount of gain realized on the transfer of all branch assets (without regard to the transfer of any assets on which loss is realized but not recognized).

(3) [Reserved].

(c)(4) Transfers of certain intangible property. Gain realized on the transfer of intangible property (computed with reference to the fair market value of the intangible property as of the date of the transfer) that is an asset of a foreign branch is taken into account in computing the limitation on loss recapture under paragraph (c)(2) of this section. For rules relating to the crediting of gain recognized under this section against income deemed to arise by operation of section 367(d), see §1.367(d)-1(g)(3).

(d) through (j) [Reserved]. For further guidance, see §1.367(a)-6T(d) through (j).

(k) Effective/applicability dates. The rules of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September

14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§1.367(a)-6T as contained in 26 CFR part 1 revised as of April 1, 2015.

Par. 9. Section 1.367(a)-7 is amended by:

1. Revising paragraph (f)(11).
2. Redesignating paragraph (j) as (j)(1) and revising the first sentence, and adding paragraph (j)(2).

The revision and addition read as follows:

§1.367(a)-7 Outbound transfers of property described in section 361(a) or (b).

* * * * *

(f) * * *

(11) Section 367(d) property is intangible property as defined in §1.367(a)-1(d)(5).

* * * * *

(j) Effective/applicability dates--(1) In general. Except as provided in paragraphs (e)(2) and (j)(2) of this section, this section applies to transfers occurring on or after April 18, 2013. * * *

(2) Section 367(d) property. The definition provided in paragraph (f)(11) of this section applies to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §1.367(a)-7 as contained in 26 CFR part 1 revised as of April 1, 2015.

§1.367(a)-7 [Amended]

Par. 10. For each section listed in the following table, remove the language in the “Remove” column and add in its place the language in the “Add” column.

<u>Section</u>	<u>Remove</u>	<u>Add</u>
§1.367(a)-7(a), sixth sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(c), second sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(c), second sentence	§1.367(a)-4T, 1.367(a)-5T	§1.367(a)-4
§1.367(a)-7(c), second sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(c)(2)(i)(B)	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(c)(2)(ii)(A)(2)	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(1), third sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(e)(1), third sentence	§1.367(a)-4T, 1.367(a)-5T	§1.367(a)-4
§1.367(a)-7(e)(1), third sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(1), last sentence	§1.367(a)-1T(b)(4) and §1.367(a)-1(b)(4)(i)(B)	§1.367(a)-1(b)(4)
§1.367(a)-7(e)(4)(ii), first and second sentences	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(5), heading	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(5)(i), first sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(5)(ii), first sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(f)(4)(ii)	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(g), last sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(g), Example 1 (ii)(A), last sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(g), Example 2 (ii)(A), last sentence	§1.367(a)-2T	§1.367(a)-2

§1.367(a)-8 [Amended]

Par. 11. For each section listed in the following table, remove the language in the “Remove” column and add in its place the language in the “Add” column.

<u>Section</u>	<u>Remove</u>	<u>Add</u>
§1.367(a)-8(b)(1)(xv), first sentence	§1.367(a)-1T(d)(1)	§1.367(a)-1(d)(1)
§1.367(a)-8(b)(1)(xv), second sentence	§1.367(a)-1T(c)(3)(i)	§1.367(a)-1(c)(3)(i)
§1.367(a)-8(c)(3)(viii)	§1.367(a)-1T(c)(3)(i) and §1.367(a)-1T(c)(3)(ii)	§1.367(a)-1(c)(3)(i) and §1.367(a)-1(c)(3)(ii)
§1.367(a)-8(c)(4)(iv)	§1.367(a)-1T(b)(4)	§1.367(a)-1(b)(4)
§1.367(a)-8(j)(3)	§1.367(a)-1T(c)(3)(ii)	§1.367(a)-1(c)(3)(ii)

Par. 12. Section 1.367(d)-1 is added to read as follows:

§1.367(d)-1 Transfers of intangible property to foreign corporations.

(a) [Reserved]. For further guidance, see §1.367(d)-1T(a).

(b) Property subject to section 367(d). Section 367(d) and the rules of this section apply to the transfer of intangible property, as defined in §1.367(a)-1(d)(5), by a U.S. person to a foreign corporation in an exchange described in section 351 or 361. See section 367(a) and the regulations thereunder for the rules that apply to the transfer of any property other than intangible property.

(c)(1) and (2) [Reserved]. For further guidance, see §1.367(d)-1T(c)(1) and (2).

(3) Useful life. For purposes of this section, the useful life of intangible property is the entire period during which exploitation of the intangible property is reasonably anticipated to occur, as of the time of transfer. Exploitation of intangible property includes any direct or indirect use or transfer of the intangible property, including use without further development, use in the further development of the intangible property itself (and any exploitation of the further developed intangible property), and use in the development of other intangible property (and any exploitation of the developed other intangible property).

(c)(4) through (g)(2) [Reserved]. For further guidance, see §1.367(d)-1T(c)(4) through (g)(2).

(g)(2)(i) The intangible property transferred constitutes an operating intangible, as defined in §1.367(a)-1(d)(6).

(g)(2)(ii) through (iii)(D) [Reserved]. For further guidance, see §1.367(d)-1T(g)(2)(ii) through (iii)(D).

(E) The transferred intangible property will be used in the active conduct of a trade or business outside of the United States within the meaning of §1.367(a)-2 and will not be used in connection with the manufacture or sale of products in or for use or consumption in the United States.

(3) Intangible property transferred from branch with previously deducted losses.

(i) If income is required to be recognized under section 904(f)(3) and the regulations thereunder or under §1.367(a)-6 upon the transfer of intangible property of a foreign branch that had previously deducted losses, then the income recognized under those sections with respect to that property is credited against amounts that would otherwise be required to be recognized with respect to that same property under paragraphs (c) through (f) of this section in either the current or future taxable years. The amount recognized under section 904(f)(3) or §1.367(a)-6 with respect to the transferred intangible property is determined in accordance with the following formula:

$$\text{Loss recapture income} \quad \times \quad \frac{\text{gain from intangible property}}{\text{gain from all branch assets}}$$

(ii) For purposes of the formula in paragraph (g)(3)(i) of this section, the "loss recapture income" is the total amount required to be recognized by the U.S. transferor pursuant to section 904(f)(3) or §1.367(a)-6. The "gain from intangible property" is the total amount of gain realized by the U.S. transferor pursuant to section 904(f)(3) and §1.367(a)-6 upon the transfer of items of property that are subject to section 367(d). "Gain from intangible property" does not include gain realized with respect to intangible property by reason of an election under paragraph (g)(2) of this section. The "gain from all branch assets" is the total amount of gain realized by the transferor upon the transfer of items of property of the branch for which gain is realized.

(g)(4) through (i) [Reserved]. For further guidance, see §1.367(d)-1T(g)(4) through (i).

(j) Effective/applicability dates. This section applies to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §1.367(d)-1T as contained in 26 CFR part 1 revised as of April 1, 2015.

Par. 13. Section 1.367(e)-2 is amended by revising paragraph (b)(3)(iii) to read as follows:

§1.367(e)-2 Distributions described in section 367(e)(2).

* * * * *

(b) * * *

(3) * * *

(iii) Other rules. For other rules that may apply, see sections 381, 897, 1248, and §1.482-1(f)(2)(i)(C).

* * * * *

Par. 14. Section 1.482-1 is amended by revising paragraphs (f)(2)(i) and (f)(2)(ii)(B) and adding paragraph (j)(7) to read as follows:

§1.482-1 Allocation of income and deductions among taxpayers.

[The text of the proposed amendments to §1.482-1 is the same as the text of §1.482-1T(f)(2)(i), (f)(2)(ii)(B), and (j)(7) published elsewhere in this issue of the **Federal Register**].

§1.884-5 [Amended]

Par. 15. Section 1.884-5 is amended in paragraph (e)(3)(ii)(A) by removing the citation “1.367(a)-2T(b)(5),” and adding the citation “1.367(a)-2(d)(5)” in its place.

§1.1248-8 [Amended]

Par. 16. Section 1.1248-8 is amended in paragraph (b)(2)(iv)(B)(1)(ii) by removing the citation “1.367(a)-6T,” and adding the citation “1.367(a)-6” in its place.

§1.1248(f)-2 [Amended]

Par. 17. Section 1.1248(f)-2 is amended in the last sentence of paragraph (e) by removing the citation “1.367(a)-2T,” and adding the citation “1.367(a)-2” in its place.

Par. 18. Section 1.6038B-1 is amended by:

1. Removing the citation “1.367(a)-1T(c),” in the fourth sentence of paragraph (b)(1)(i) and adding the citation “1.367(a)-1(c)” in its place.
2. Adding paragraphs (c)(4)(i) through (vii), (c)(5), and (d)(1)(iv) and (vii)
3. Revising the first sentence of paragraph (g)(1).

4. Adding paragraph (g)(7).

The additions and revision read as follows:

§1.6038B-1 Reporting of certain transfers to foreign corporations.

* * * * *

(c) * * *

(1) through (4) [Reserved]. For further guidance, see §1.6038B-1T(c)(1) through (4).

(i) Active business property. Describe any transferred property that qualifies under §1.367(a)-2(a)(2). Provide here a general description of the business conducted (or to be conducted) by the transferee, including the location of the business, the number of its employees, the nature of the business, and copies of the most recently prepared balance sheet and profit and loss statement. Property listed within this category may be identified by general type. For example, upon the transfer of the assets of a manufacturing operation, a reasonable description of the property to be used in the business might include the categories of office equipment and supplies, computers and related equipment, motor vehicles, and several major categories of manufacturing equipment. However, any property that is includible in both paragraphs (c)(4)(i) and (iii) of this section (property subject to depreciation recapture under §1.367(a)-4(a)) must be identified in the manner required in paragraph (c)(4)(iii) of this section. If property is considered to be transferred for use in the active conduct of a trade or business under a special rule in paragraph (e), (f), or (g) of §1.367(a)-2, specify the applicable rule and provide information supporting the application of the rule.

(ii) Stock or securities. Describe any transferred stock or securities, including the class or type, amount, and characteristics of the transferred stock or securities, as well as the name, address, place of incorporation, and general description of the corporation issuing the stock or securities.

(iii) Depreciated property. Describe any property that is subject to depreciation recapture under §1.367(a)-4(a). Property within this category must be separately identified to the same extent as was required for purposes of the previously claimed depreciation deduction. Specify with respect to each such asset the relevant recapture provision, the number of months that such property was in use within the United States, the total number of months the property was in use, the fair market value of the property, a schedule of the depreciation deduction taken with respect to the property, and a calculation of the amount of depreciation required to be recaptured.

(iv) Property not transferred for use in the active conduct of a trade or business. Describe any property that is eligible property, as defined in §1.367(a)-2(b) taking into account the application of §1.367(a)-2(c), that was transferred to the foreign corporation but not for use in the active conduct of a trade or business outside the United States (and was therefore not listed under paragraph (c)(4)(i) of this section).

(v) Property transferred under compulsion. If property qualifies for the exception of §1.367(a)-2(a)(2) under the rules of paragraph (h) of that section, provide information supporting the claimed application of such exception.

(vi) Certain ineligible property. Describe any property that is described in §1.367(a)-2(c) and that therefore cannot qualify under §1.367(a)-2(a)(2) regardless of

its use in the active conduct of a trade or business outside of the United States. The description must be divided into the relevant categories, as follows:

- (A) Inventory, etc. Property described in §1.367(a)-2(c)(1);
- (B) Installment obligations, etc. Property described in §1.367(a)-2(c)(2);
- (C) Foreign currency, etc. Property described in §1.367(a)-2(c)(3); and
- (D) Leased property. Property described in §1.367(a)-2(c)(4).

(vii) Other property that is ineligible property. Describe any property, other than property described in §1.367(a)-2(c), that cannot qualify under §1.367(a)-2(a)(2) regardless of its use in the active conduct of a trade or business outside of the United States and that is not subject to the rules of section 367(d) under §1.367(a)-1(b)(5). Each item of property must be separately identified.

(c)(4)(viii) [Reserved]. For further guidance, see §1.6038B-1T(c)(4)(viii).

(5) Transfer of foreign branch with previously deducted losses. If the property transferred is property of a foreign branch with previously deducted losses subject to §§1.367(a)-6 and -6T, provide the following information:

(i) through (iv) [Reserved]. For further information, see §1.6038B-1T(c)(5)(i) through (iv).

* * * * *

(d)(1) through (1)(iii) [Reserved]. For further guidance, see §1.6038B-1T(d)(1) through (1)(iii).

(iv) Intangible property transferred. Provide a description of the intangible property transferred, including its adjusted basis. Generally, each item of intangible property must be separately identified, including intangible property described in

§1.367(d)-1(g)(2)(i) or that is subject to the rules of section 367(d) under §1.367(a)-1(b)(5).

(d)(1)(v) through (d)(1)(vi) [Reserved]. For further guidance, see §1.6038B-1T(d)(1)(v) through (1)(vi).

(d)(1)(vii) Coordination with loss rules. List any intangible property subject to section 367(d) the transfer of which also gives rise to the recognition of gain under section 904(f)(3) or §§1.367(a)-6 or -6T. Provide a calculation of the gain required to be recognized with respect to such property, in accordance with the provisions of §1.367(d)-1(g)(4).

(d)(1)(viii) through (d)(2) [Reserved]. For further guidance, see §1.6038B-1T(d)(1)(viii) through (2).

* * * * *

(g) Effective/applicability dates. (1) Except as provided in paragraphs (g)(2) through (g)(7) of this section, this section applies to transfers occurring on or after July 20, 1998, except for transfers of cash made in tax years beginning on or before February 5, 1999 (which are not required to be reported under section 6038B), and except for transfers described in paragraph (e) of this section, which applies to transfers that are subject to §§1.367(e)-1(f) and 1.367(e)-2(e). * * *

* * * * *

(7) Paragraphs (c)(4)(i) through (vii), (c)(5), and (d)(1)(iv) and (vii) of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under

§301.7701-3 that are filed on or after September 14, 2015. For guidance with respect to paragraphs (c)(4), (c)(5), and (d)(1) of this section before this section is applicable, see §§1.6038B-1 and 1.6038B-1T as contained in 26 CFR part 1 revised as of April 1, 2015.

John M. Dalrymple,

Deputy Commissioner for Services and Enforcement.

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